Termination of Employment — Unlawful termination — Prohibition on termination for employee’s absence from work because of illness or injury — Whether employee’s absence from work constituted “temporary absence” as defined in Workplace Relations Regulations 2006 (Cth), reg 2.12.8(1) — Whether employee required to substantiate reason for absence — Workplace Relations Act 1996 [Post Work Choices] (Cth), s 659(2)(a) — Workplace Relations Regulations 2006 (Cth), reg 2.12.8(1).

Australian Workplace Agreements — Whether Fair Treatment Policy in AWA was breached by employer — Whether Fair Treatment Policy was contractual or enforceable — Fair Treatment Policy in AWA a non-promissory commitment — Workplace Relations Act 1996 [Post Work Choices] (Cth), ss 719, 721, 722.

Contract of Employment — Whether an Implied Term of Mutual Trust and Confidence is one implied in law in contracts of employment in Australia — Implied Term of Mutual Trust and Confidence will be implied in relation to contracts of employment in Australia unless expressly excluded by parties.

Words and Phrases — “Reason”.

Words and Phrases — “Substantiate”.

An employee applied for relief for termination of employment on the following grounds:

1. The termination was unlawful under s 659(2) of the Workplace Relations Act 1996 (Cth) due to an absence from work because of illness or injury.
3. A breach of the contract of employment.

The employee was employed as a process operator at the employer’s paint pigment factory from July 2000 until his termination of employment on 16 February 2007. The employer terminated the employment of the employee after the employee was absent for a period of one day when he attended a medical specialist in connection with an injury that he had sustained in a motor cycle.
accident in 2003. The employer also relied on a second absence of the employee from his place of work in the production line on another occasion that had resulted in the stopping of packing.

The employer and the employee had a number of meetings to discuss the employee’s leave of absence for a medical appointment as well as the stopping of work during the night shift. As a result of these meetings the employer summarily terminated the employee’s employment.

The employee argued that his termination of employment was an unlawful termination because it was terminated for reasons including his temporary absence from work because of illness or injury. The employer argued that the employee was terminated for other reasons.

The employee also argued that the employer breached the Fair Treatment provisions of the AWA in terminating his employment. The employer submitted that the relevant terms of the AWA were not contractual in nature.

The employee alleged a breach of the contract of employment on the basis that the employer had breached the Implied Term of Mutual Trust and Confidence that they would not without reasonable cause conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employee and the employer. The employer submitted that there were no grounds on which an Implied Term of Mutual Trust and Confidence should be implied into the contract.

Held: (1) The employee’s absence from work was not a “temporary absence from work because of illness or injury within the meaning of the regulations” because there was no requirement under the terms of the AWA that he substantiate the reason for his absence.

(2) The fair treatment provisions can, in the court’s view, be fairly described as a non-promissory commitment. The provisions of the AWA which entail a “commitment” to fair treatment rather than an entitlement are indicative of the fair treatment provisions being neither contractual in nature, nor being intended to be enforceable provisions of the AWA.

(3) The court considers, based on decisions of Australian superior courts, that it must recognise the Implied Term of Mutual Trust and Confidence is part of Australian law in relation to contracts of employment and should be implied into contracts of employment, unless expressly excluded by the parties.

(4) There was no breach of the Implied Term of Mutual Trust and Confidence by the employer on any of the grounds alleged by the employee.

Cases Cited

Bliss v South East Thames Regional Health Authority [1985] IRLR 308.
Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66.
Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 144.
Concut Pty Ltd v Worrell (2000) 75 ALJR 312; 103 IR 160.
Courtaulds Northern Textiles Ltd v Andrews [1979] IRLR 84.
Downe v Sydney West Area Health Service (No 2) (2008) 174 IR 385.
Goldman Sachs JBWere Services Pty Ltd v Nikolich (2007) 163 FCR 62.
Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589.
The applicant, Carl Rogers,1 was employed by the first respondent, Millennium Inorganic Chemicals Limited,2 from about July 2000 until his termination on 16 February 2007. At the time of his termination Mr Rogers was employed as a process operator at Millennium’s paint pigment manufacturing plant at Australind in the south west of Western Australia.

Millennium terminated Mr Rogers following:

a) an absence on 22 January 2007 for which Mr Rogers claimed sick leave and during which Mr Rogers had a radiological scan and visited a medical specialist in Perth in connection with his knee, which had been injured in a motor cycle accident in September 2003; and

b) an alleged absence from his place of work on the production line during a night shift on 12 February 2007.

Mr Rogers has applied to the Court for relief:

a) under s 659(2)(a) of the Workplace Relations Act 1996 (Cth)3 in relation to alleged unlawful termination;

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1 Mr Rogers.
2 Millennium.
3 WR Act.
b) under ss 719, 721 and 722 of the WR Act for alleged contravention of Mr Rogers’ Australian Workplace Agreement; and

c) in relation to an alleged breach of Mr Rogers’ contract of employment.

Procedural history

Mr Rogers applied to the Australian Industrial Relations Commission on 1 March 2007 for relief in respect of termination of employment under s 643(1)(b) of the WR Act.

The AIRC issued a certificate and made a recommendation on 17 April 2007 when it was unable to settle the matter by conciliation.

Mr Rogers commenced these proceedings on 25 May 2007.

Mr Rogers’ election (or application) being under s 643(1)(b) of the WR Act, and not under s 643(1)(a) of the WR Act, means that there is no issue before the Court as to whether his termination was harsh, unjust or unreasonable.

The application was heard on 4 and 5 December 2007. As a consequence of an application in a case by Mr Rogers there was a further hearing on 19 March 2008. That application in a case, which sought, essentially, to allow the filing of further affidavit material to remedy omissions in Mr Roger’s case related to damages, was adjourned pending judgment on the principal issue of liability.

Application and orders sought

Mr Rogers’ application seeks the following orders:

a) under s 665 of the WR Act:
   i) a declaration that Millennium unlawfully terminated Mr Rogers’ contract of employment contrary to s 659(2)(a) of the WR Act;
   ii) an order that Millennium pay a penalty of not more than $10,000 for the alleged contravention of s 659(2)(a) of the WR Act, and that the penalty be paid to Mr Rogers; and
   iii) an order that Millennium pay to Mr Rogers compensation of an amount that the Court thinks appropriate;

b) under ss 719, 721 and 722 of the WR Act:
   i) a declaration that Millennium contravened a provision of Mr Rogers’ Australian Workplace Agreement on four occasions contrary to s 719 of the WR Act:
   ii) a declaration that Mr Fenech was involved in Millennium’s contraventions of the provisions of Mr Rogers’ AWA;
   iii) an order that Millennium pay a penalty of not more than $33,000 for each of the four contraventions of a provision of Mr Rogers’ AWA, and that the penalties be paid to Mr Rogers;

4 AWA.
5 AIRC.
6 WR Act, s 650(2)(a) and (c).
8 AWA.
iv) an order that Mr Fenech pay a penalty of not more than $6,600 for each of the four instances of being involved in Millennium’s contraventions of Mr Rogers’ AWA, and that the penalties be paid to Mr Rogers;

v) an order that Millennium pay to Mr Rogers entitlements under the AWA as quantified by the Court;

vi) an order that Millennium and Mr Fenech pay damages of an amount to be determined by the Court for the contraventions of Mr Rogers’ AWA; and

vii) an order that Millennium and Mr Fenech pay interest on the damages and entitlements due under Mr Rogers’ AWA; and

c) in the alternative to the claim under s 721 of the WR Act, in the associated jurisdiction of the Court:

i) a declaration that Millennium breached an implied term in Mr Rogers’ contract of employment;

ii) an order that Millennium pay damages of an amount to be determined by the Court for the breach of the implied term; and

iii) an order that Millennium pay interest on the damages.

**Facts**

**Employment history**

Mr Rogers commenced working as a process operator with Millennium in about July 2000.

**The Company**

Millennium is a company incorporated under the Corporations Law and carries on business as a manufacturer of paint pigments at Australind.

**Mr Fenech**

Millennium employed the second respondent, Mr Fenech, as its Employee Relations Manager.

**Terms of AWA re fair treatment**

Mr Rogers and Millennium agree that:

a) they became parties to an AWA in or about November 2002;

b) it was a term of the AWA that Mr Rogers would comply with all regulations, policies, practices and procedures of Millennium.

The parties dispute whether it was a term of the AWA that Millennium treat Mr Rogers fairly, with an opportunity to raise, discuss and resolve problems that might arise in the workplace. Even if there were such a term, Millennium and Mr Fenech deny that it was breached.

The relevant terms of the AWA are set out below.

**Motor cycle accident**

Mr Rogers alleges that on 5 September 2003 he was involved in a motor cycle accident and suffered injuries to his left ankle, knee, hand and elbow.

Mr Rogers alleges that he returned to his position with Millennium in

9 Implied Term of Mutual Trust and Confidence.
January 2004. Millennium and Mr Fenech say that Mr Rogers returned to work in March 2004, after a period of Block Leave taken throughout February 2004, but that difference is immaterial for present purposes.

Rehabilitation

Mr Rogers asserts that since his return to duties in early 2004 he has had ongoing rehabilitation of his knee injury.

Radiological scan

Consistent with his assertion of ongoing rehabilitation Mr Rogers says that on or about 19 January 2007 he arranged a radiological scan of the knee and a meeting with a medical specialist for Monday 22 January 2007. Millennium and Mr Fenech deny this and say that Mr Rogers was informed by the secretary of a medical specialist on either 16 or 17 January 2007 that he would be required to attend two appointments on 22 January 2007, one for an x-ray at 7.30am and an appointment with a medical specialist at 3.30pm.

Mr Rogers says he travelled to Perth on 21 January 2007 and had the radiological scan performed on his knee at about 7.30am on 22 January 2007.

Appointment to see the medical specialist

Mr Rogers then asserts that he learned that his appointment to see the medical specialist was not until 3.30pm. Millennium and Mr Fenech say that he learned of this appointment on either 16 or 17 January 2007.

Notification of absence

The parties are in dispute as to whether Mr Rogers notified Millennium of his absence from duty as soon as practicable. Mr Rogers said he did. Millennium and Mr Fenech allege that he did not.

Message on the supervisor’s answering machine

Mr Rogers alleges he telephoned Millennium’s day supervisor at about 8.30am on 22 January 2007 and left a message on the supervisor’s answering machine that he would not be in to work his scheduled night shift that evening.

Mr Rogers alleges that the telephone message was left in accordance with Millennium’s policies, practices and procedures. Millennium and Mr Fenech deny the telephone call was made in accordance with Millennium’s sick leave policy, because Millennium says that policy requires an employee to advise a supervisor as soon as they become aware that they will be unable to attend work, and to state the nature of the illness or injury and the likely period of absence, and that in this case Mr Rogers was, or should have been, aware on 16 or 17 January 2007 that he would, in all likelihood, be unable to attend work on 22 January 2007.

Return to Bunbury

Mr Rogers says that he returned to Bunbury, a city just south of Australind, after seeing the medical specialist, arriving at or about 9.30pm on Monday 22 January 2007.

Sick leave application form

Mr Rogers says that in accordance with Millennium’s policies, practices and procedures Mr Rogers completed and lodged a sick leave application form. Millennium and Mr Fenech deny this, saying that the sick leave policy provides that where an employee is unable to attend work owing to illness or injury, the employee must complete a sick leave application form immediately upon return
to work, but that the policy provides that sick leave will only be provided in the case of genuine illness or injury. Millennium and Mr Fenech say that Mr Rogers’ absence from work on 22 January 2007 was not because of illness or injury and was therefore irrelevant to Mr Rogers’ absence from work. Millennium and Mr Fenech say that Mr Rogers’ application for sick leave was considered by Millennium and declined on the basis that it was not illness or injury because:

a) the reason for the absence was for a meeting with a medical specialist;

b) attendance at a medical appointment which does not require absence from work does not come within the meaning of sick leave; and

c) Mr Rogers did not provide Millennium with a medical certificate for the alleged illness or injury.

Details of relevant policies and forms are set out below.

5 February 2007 meeting

On 5 February 2007 Mr Rogers was summoned to a meeting with Mr Fenech and other representatives of management of Millennium.

Mr Rogers alleges that Mr Fenech expressed criticism of Mr Rogers for his absence on the night shift of 22 January 2007. Mr Rogers says that after Mr Fenech heard details of the reasons for Mr Rogers’ absence on 22 January 2007 he said words to the effect that Mr Rogers could have come to work after he returned to Bunbury, despite being fatigued, and that the shift was short-handed and that Mr Fenech is said to have said that Millennium would call the absence an unauthorised day off and deduct money from Mr Rogers’ next pay. Mr Rogers says he asserted that Millennium and Mr Fenech were harassing him, to which Mr Fenech stated that they were not picking on him, but nevertheless called him “dishonest and deceitful.”

Millennium and Mr Fenech deny the alleged criticism of Mr Rogers. Millennium and Mr Fenech say that at the meeting on 5 February 2007 Mr Fenech provided Mr Rogers with an opportunity to explain why he did not attend work on 22 January 2007. After Mr Rogers provided an explanation, it is said that Millennium’s Production Superintendent, a Mr Rob Saracini, told Mr Rogers that 22 January 2007 would be treated as unpaid, unauthorised leave, because Mr Rogers was fit to attend work on that day. Millennium and Mr Fenech say that Mr Rogers accepted this suggestion. They further say that Mr Saracini then asked Mr Rogers if he could have attended work late on the night in question, and that Mr Rogers replied that he had not thought of that. Millennium and Mr Fenech say that in response to a request from Mr Fenech, Mr Rogers agreed to provide the contact details for the medical specialist that Mr Rogers saw on 22 January 2007, having explained that Mr Fenech wanted to check the details of the appointments. Millennium and Mr Fenech then say that Mr Fenech informed Mr Rogers that the matter would be discussed further once Mr Fenech had had an opportunity to check the position in relation to the two appointments.

Payment for absence

Millennium deducted from Mr Rogers’ salary and allowances Mr Rogers’ previously paid sick leave entitlements for the absence on 22 January 2007. Millennium and Mr Fenech say that Mr Rogers was not entitled to sick leave for his absence on 22 January 2007 and was therefore not entitled to payment for that absence.
On 15 February 2007 Mr Rogers was instructed, by telephone, by Mr Fenech, to attend a meeting with Mr Fenech that day at 3.00pm.

The meeting involved Mr Rogers, Mr Fenech, Mr Saracini and Millennium’s Production Supervisor, Mr Geoff Brewer. Mr Rogers also brought a representative to the meeting. Mr Rogers says that at the meeting he was accused of not properly performing his duties on the night shift of 12 February 2007, in that he stopped the packing of Millennium’s product during the night shift on 12 February 2007. Millennium and Mr Fenech say that at the meeting they discussed with Mr Rogers the findings of Millennium’s investigation into Mr Rogers’ non-attendance at work on 22 January 2007, and say that Mr Fenech informed Mr Rogers that it had been reported that he had walked away from the packing heads to do clean up at 4.30am on the night shift of Monday 12 February 2007, and was provided with an opportunity, at the meeting, to explain what happened at that time on that night.

At the meeting on 15 February 2007 Mr Rogers says that he denied not properly performing his duties during night shift on 12 February 2007 and provided “an account” of what occurred on that shift. Millennium and Mr Fenech say that Mr Rogers provided “his account” of what occurred on the night shift on 12 February 2007.

Mr Rogers alleges that Mr Fenech told Mr Rogers at the meeting on 15 February 2007 that termination of Mr Rogers’ employment was being considered by Millennium, and that he was instructed to return at 4.00pm on 16 February 2007. Millennium and Mr Fenech say that there was a general discussion involving Mr Rogers, Mr Fenech, Mr Saracini and Mr Brewer in relation to the events of 12 February 2007, and when that discussion ended, Mr Fenech informed Mr Rogers that Millennium was considering termination of his employment, depending on the outcome of further investigation.

There was another meeting on 16 February 2007, this time involving Mr Rogers, Mr Fenech and Mr Saracini. Mr Fenech told Mr Rogers that representatives of Millennium had interviewed other employees on Mr Rogers’ shift on 12 February 2007, and that the accounts of those other employees differed from Mr Rogers’ account. Mr Fenech also says that he informed Mr Rogers that technical data from “the incident” did not support Mr Rogers’ version of events in relation to the events of 12 February 2007.

Mr Rogers says that Mr Fenech refused to tell Mr Rogers who the persons were who had provided the account of events which differed from his own, or in what way the account of events differed from that of Mr Rogers. Millennium and Mr Fenech deny this, and say that Mr Rogers did not ask to be provided with details of the employees who had provided a different account of events, or in what way the accounts differed.

Mr Rogers alleges that Mr Fenech, on behalf of Millennium, at the end of the meeting on 16 February 2007 summarily terminated Mr Rogers’ employment. Millennium and Mr Fenech deny this and say that having provided the information set out above, Mr Fenech asked Mr Rogers what could be done to resolve the situation, to which Mr Rogers replied that Millennium should do
what it had to do, and that if he was going to be sacked, he wanted it in writing. Millennium and Mr Fenech then say that the decision was made to terminate Mr Rogers’ employment.

There is no dispute that the termination of Mr Rogers’ employment was based on the following alleged or stated reasons:

a) stopping packing at the packing heads on 12 February 2007;

b) failure to advise in a timely manner of his inability to attend for work on 22 January 2007; and

c) lodgement of a sick leave application for the absence on 22 January 2007 when he was not suffering an illness or injury which prevented him from working.

Millennium and Mr Fenech say that Mr Rogers had been previously warned about the seriousness of stopping packing at the packing heads.

Millennium and Mr Fenech also say that Mr Fenech provided Mr Rogers with a letter of termination of employment, explaining that Mr Rogers was to be terminated immediately and paid one month of salary in lieu of notice.

Payment on termination of employment - accrued Block Leave

Mr Rogers, in accordance with his AWA, worked a shift roster known as the Lyondell 12 hour shift roster comprising:

a) 12 hour shifts to be worked between 6.00pm and 6.00am (night shift) or 6.00am and 6.00pm (day shift);

b) a regular programmed sequence of night shifts, day shifts and days and nights of work, over a 16 week period; and

c) a period of paid absence from work known as Block Leave after the completion of 16 weeks shift work, such leave incorporating, over a 12 month period, five weeks annual leave.

The parties agree that on termination of Mr Rogers’ employment Mr Rogers had completed 15 of the 16 weeks of the Lyondell shift roster and had therefore accrued 15/16th of the Block Leave due for the period ending 25 February 2007.

Mr Rogers asserts that on termination he was entitled to be paid $4,544.57 by way of accrued Block Leave, but was only paid $2,813.32, being an underpayment of $1,731.25.

Millennium and Mr Fenech deny this and say that Mr Rogers was paid correctly for the period of Block Leave to which he was entitled. Millennium and Mr Fenech say that Block Leave is calculated over the entire period of the employee’s employment, and that Mr Rogers’ entitlement was calculated in this way in accordance with established policy and agreement between Mr Rogers and Millennium.

Payment on termination of employment — pay in lieu of notice

Mr Rogers says that on termination of employment he was entitled to be paid $6,059.43 by way of pay in lieu of notice. Mr Rogers says that on termination of his employment he was paid $4,847.54 by way of pay in lieu of notice, an underpayment of $1,211.89.

Millennium and Mr Fenech say that Mr Rogers was entitled to be paid five weeks pay in lieu of notice on termination of employment. Millennium and Mr Fenech deny that Mr Rogers was underpaid in relation to pay in lieu of notice and say that he was paid four weeks in lieu of notice on termination, and a further week in lieu of notice on 23 May 2007.
Alleged unlawful termination — section 659(2)(a) of the WR Act

Unlawful termination — temporary absence from work because of illness or injury — introduction

Mr Rogers alleges that the termination of his employment was an unlawful termination contrary to s 659(2)(a) of the WR Act because employment was terminated for reasons including his temporary absence from work because of illness or injury.

Millennium and Mr Fenech deny that the termination was contrary to s 659(2)(a) and say that Mr Rogers’ employment was terminated for the reasons set out at paragraph 38 above. Millennium also argue that s 659(2)(a) also only applies to absences from work in the nature of force majeure events. Further, Millennium and Mr Fenech say that Mr Rogers’ absence from work on 22 January 2007 does not fall within the meaning of temporary absence from work because of illness or injury under reg 2.12.8(1) of the Workplace Relations Regulations 2006 (Cth), because Mr Rogers did not, according to Millennium and Mr Fenech:

a) notify Millennium of an absence from work in accordance with the terms of the AWA;

b) substantiate the reasons for the absence as required by the terms of the AWA, and further say that attendance at a medical appointment which does not require absence from work does not come within the meaning of sick leave; or

c) provide a medical certificate for the illness or injury.

Legislative Provisions

Section 659(2)(a) relevantly provides as follows:

(2) … an employer must not terminate an employee’s employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

(a) temporary absence from work because of illness or injury within the meaning of the regulations;

Regulation 2.12.8 deals with what constitutes an employee’s absence from work because of illness or injury is a temporary absence, and relevantly provides as follows:

(1) For paragraph 659 (2) (a) of the Act, an employee’s absence from work because of illness or injury is a temporary absence if:

(a) the employee provides a medical certificate for the illness or injury within:

(i) 24 hours after the commencement of the absence; or

(ii) such longer period as is reasonable in the circumstances; or

(b) the employee:

(i) is required by the terms of an industrial instrument to:

(A) notify the employer of an absence from work; and

(B) substantiate the reason for the absence; and

(ii) complies with those terms; or

(c) the employee has provided the employer with a required document in accordance with section 254 of the Act.

(2) …. 

10 WR Regs.
In this regulation: *medical certificate* has the meaning given by section 240 of the Act.

Section 240 of the WR Act defines:

a) “medical certificate” as meaning:

a certificate signed by a registered health practitioner

b) “registered health practitioner” as meaning:

a health practitioner registered, or licensed, as a health practitioner (or as a health practitioner of a particular type) under a law of the a State or Territory that provides for the registration or licensing of health practitioners (or health practitioners of that type).

**Consideration of s 659(2)(a) and reg 2.12.8**

The Federal Court has considered the interaction between, and construction of, s 659(2)(a) and reg 2.12.8 and their statutory forebears. In the context of the current provisions of the WR Act (s 659(2)(a)) and WR Regs (reg 2.12.8) that consideration establishes that:

a) reg 2.12.8 is an exhaustive statement of what constitutes a temporary absence from work under s 659(2)(a); and

b) if a particular absence does not fall within the matters defined in reg 2.12.8 then s 659(2)(a) has no application (even if ordinarily the particular absence could be said to be a temporary absence).

It is therefore necessary, for an absence to be a “temporary absence from work” under s 659(2)(a), that one of the preconditions in reg 2.12.8 be met.

**Consideration of this case**

In this case the provisions of reg 2.12.8(1)(a) and (c) do not arise, it being common ground that Mr Rogers:

a) did not provide a medical certificate; and

b) was not required to provide Millennium with a required document.

The question is whether Mr Rogers was required by the terms of the AWA to:

a) notify Millennium of an absence from work; and

b) substantiate the reasons for the absence,

and, if so required, whether he complied with those terms.

In respect of sick leave the AWA provides that:

In the case of genuine sickness or accident with an absence of up to one month’s duration, no loss of income is experienced. After one month’s continuous absence, base salary will continue to be paid but all allowances will cease. The company guideline is to review sickness cases after three months’ absence. Medical certificates are required for all absences in excess of two working days.

Under the heading “General Conditions” the AWA provides that:

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11 *Sallehpour, Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784 (Nikolich). Nikolich was appealed, but not on this point: see *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62 (Nikolich Appeal) of which a part only — as to costs — is reported at *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62. The statutory forebears are the former s 170CK(2)(c) of the WR Act and reg 30C of the Workplace Relations Regulations 1996 (Cth).

12 Nikolich at [169] and [177] per Wilcox J.

13 Nikolich at [169] per Wilcox J.

14 *Sallehpour* at [43]-[45] per Marshall J; Nikolich at [175] per Wilcox J.

15 Exhibit A1.
You are required to comply with all company regulations, policies, practices and procedures.

For your safety and the safety of others, you are required to ... abide by all safety rules, regulations, policies and procedures. ...

The terms and conditions of employment that apply will be those which apply generally to Millennium Chemicals Ltd staff. Enclosed is a copy of the Millennium Chemicals General Conditions of Employment - Staff, which form part of this contract of employment. ...

This Agreement is a complete statement of the mutual rights and obligations as between the company and you to the exclusion (to the full extent permitted by law) of other laws, awards, agreements and like instruments save only for the terms and conditions of employment between the company and you which are not inconsistent with the Agreement.16

The “General Conditions of Employment — Staff” referred to under the “General Conditions” of the AWA provide as follows with respect to sick leave:

In the case of genuine illness or injury the Company provides access to Sick Leave of up to 3 months in accordance with the Sick Leave Policy. 

Medical certificates may be required.17

The “General Conditions of Employment — Staff” also provide that Mr Rogers was required to:

a) "abide by all safety rules, regulations, policies and procedures";18 and

b) “comply with all company regulations, policies, practices and procedures."19

Millennium’s Sick Leave and Carer’s (Family) Leave Policy Australia20 provides as follows:

1.0 Policy Statement

In the case of genuine illness or injury the Company provides access to sick leave. Applications for paid or unpaid Sick Leave of up to a maximum of 3 months will be reviewed by the Company. The Company will review each situation on a case-by-case basis. Factors taken into consideration include, but are not limited to: circumstances of the illness/injury; attendance & sick leave history; length of service. Medical certificates may be required. ...

Sick Leave is not available when an employee is entitled to Workers Compensation benefits, or where the illness or injury is self-inflicted or attributable to misconduct on the part of the employee. Generally, cosmetic and/or elective surgery does not qualify as Sick Leave.

2.0 Procedure

You are required to advise your Supervisor as soon as you become aware that you will be unable to attend work, and state the nature of the illness or injury and the likely period of your absence. Normally, this will be no later than two (2)

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16 Exhibit A1.
17 Exhibit A2, cl.6.2.
18 Exhibit A2, cl.1.0.
19 Exhibit A2, cl.5.0.
20 “Sick Leave Policy” — Exhibit A5.
hours after the commencement of your work roster. You must complete AP/DPS0352 Application for Leave form immediately upon your return to work, or in advance if you are aware of the need for leave.

...

Medical certificates are required for all absences in excess of two “consecutive” working days, and as requested in the case of several non-consecutive instances, in a 12-month period. Medical certificates should generally be provided by the doctor at a consultation during (not after) the illness. …

The Application for Leave form referred to in clause 2.0 of the Sick Leave Policy requires the employee to specify the type of leave and includes provision for sick leave to be specified, as well as requiring the “Reason for Sick Leave” to be specified. 21

The question in relation to this issue is not whether Mr Rogers is entitled to sick leave but whether he was required by the terms of the AWA (including expressly the terms of the relevant policies prescribing the entitlement to sick leave) to notify Millennium of his absence from work and substantiate the reason for the absence, and whether he complied with those terms.

Millennium contended that:

a) Mr Rogers could not substantiate the reason because his absence was not a consequence of a force majeure event, or at all; and
b) in any event, because Mr Rogers was not required by the Sick Leave Policy to submit a medical certificate for a single day absence, there was no requirement to substantiate under the AWA.

There can be no question that Mr Rogers was required to notify Millennium of his absence from work, and to do so “as soon as” he became aware that he was unable to attend work, such that the notification “[n]ormally … will be no later than two (2) hours after the commencement of … [the] work roster.” 22

To be a temporary absence the employee must also be required to “substantiate” the reason for the absence. 23 Citing the Macquarie Dictionary Millennium argue that to substantiate means to “establish by proof or competent evidence”. 24

The Shorter Oxford English Dictionary on Historical Principles includes the following definition of “substantiate”, similar to that in the Macquarie Dictionary:

to demonstrate or verify by proof or evidence 25

but then goes on to add the following further definition:

to make good. 26

The Concise Oxford Dictionary of Current English defines “substantiate” as:

prove the truth of, give good grounds for, (change, statement, claim). 27

21 Exhibit A9.
22 Sick Leave Policy, cl.1.0 and 2.0.
24 Millennium’s Outline of Submissions, para.45.
An example of substantiation is the requirement under the Corporations Act 2001 (Cth)\(^{28}\) for a court to determine the “substantiated amount” of a demand,\(^{29}\) that is to identify the genuine level of a claim and any offsetting claim for the purpose of calculating the substantiated amount of the demand.\(^{30}\)

Regulation 2.12.8(1)(b)(i)(B) uses both “reason” and “substantiate”. If, for these purposes, “reason” equated to “substantiate” (or substantiation) the Parliament would have used one word or the other, but not both juxtaposed, in reg 2.12.8(1)(b)(i)(B). Because Parliament has used different words so close together it is safe to assume that different meanings were intended.\(^{31}\) Bearing in mind the meaning of “substantiate” it seems that “reason” in this context is intended to refer to a:

statement of some fact (… alleged) employed as an argument to … prove …some assertion\(^{32}\)

or more simply

(fact adduced or serving as) …cause, or justification.\(^{33}\)

Essentially, “reason” is referrable in the context of reg 2.12.8(1)(b)(i)(B) to a fact alleged to justify an assertion. It is the alleged fact which then has to be substantiated.

Under the Sick Leave Policy Mr Rogers was required to:

a) advise his supervisor as soon as he became aware that he was unable to attend work;

b) state the nature of the illness or injury which made him unable to work;

c) state the likely period of absence; and

d) complete the Application for Leave form.

Completion of the Application for Leave form required only that Mr Rogers give a “Reason for Sick Leave”.\(^{34}\) Mr Rogers gave the reason as “DOCTORS”.\(^{35}\) That is a reason, that is, a factual allegation that he was at a doctors, used to justify an assertion that he was on sick leave. But it does not constitute substantiation, for that requires some form of proper proof or making good of the reason.

Assuming, for present purposes, that Mr Rogers complied with each of the requirements of the Sick Leave Policy (and hence the terms of the AWA), they do not amount, individually or collectively, to substantiation of the reason for the absence. What Mr Rogers had to do was, essentially, tell Millennium, initially orally and then in writing, that he was absent and why. No substantiation was required under the terms of the Sick Leave Policy, which are incorporated as terms of the AWA.

Under the terms of the Sick Leave Policy Millennium was entitled to review

\(^{28}\) Corporations Act.

\(^{29}\) Corporations Act, s 459H.


\(^{33}\) The Concise Oxford Dictionary, p.863.

\(^{34}\) Exhibits A9 and R3.

\(^{35}\) Exhibit R3.
Mr Rogers’ application for paid sick leave, and did so by investigation and inquiring into the circumstances giving rise to the application. However, the Sick Leave Policy did not require Mr Rogers to substantiate anything upon such a review, and although Millennium may have required him to provide a medical certificate, they did not do so. Thus, there was nothing in the review which required Mr Rogers, under the terms of the industrial instrument, to substantiate the reason for his absence.

Mr Rogers’ absence from work on night shift on 22 January 2007 was not a “temporary absence from work because of illness or injury within the meaning of the regulations” because there was no requirement under the terms of the AWA that he “substantiate the reason for the absence.” Mr Rogers’ allegation that the termination of his employment was an unlawful termination contrary to s 659(2)(a) of the WR Act because employment was terminated for reasons including his temporary absence from work because of illness or injury therefore fails, and that part of his claim must be dismissed.

In view of the foregoing conclusion it is unnecessary to consider other arguments by both parties in relation to Mr Rogers’ claim under s 659(2)(a) of the WR Act.

Alleged contravention of AWA and alleged Implied Term of Mutual Trust and Confidence in relation to events leading to termination

Amended Statement of Claim

The Amended Statement of Claim alleges that Millennium breached the AWA and the alleged Implied Term of Mutual Trust and Confidence by:

a) giving consideration to terminating the applicant’s employment before conducting any investigation of the applicant’s account of events on the night of 12 February 2007;

b) refusing to tell the applicant the identity of the persons who had provided the account of events or in what way the account of events differed from that of the applicant;

c) unlawfully deducting from the applicant’s salary and allowances the applicant’s sick leave entitlements for the absence on 22 January 2007; and

d) failing to pay the applicant all his entitlements on termination of employment.

Specifically it is alleged that the above actions constitute a breach of:

a) clause 11 of Mr Rogers’ AWA; and

b) the alleged Implied Term of Mutual Trust and Confidence.

The reference to “Clause 11 of the Applicant’s AWA” (referred to in para.37 of the Amended Statement of Claim) was treated as a reference to clause 11.0 — Fair Treatment of the General Conditions of Employment — Staff by the parties in the hearing. There is no dispute that the Fair Treatment provisions of
the General Conditions of Employment — Staff are incorporated into the AWA, as are the terms of the Fair Treatment Policy. 40 There is a dispute as to whether the relevant terms are contractual in nature, Mr Rogers alleging that it is a term of the AWA that Millennium “would treat … [him] fairly and he would have the opportunity to raise, discuss and resolve problems that might arise in the workplace” 41 and Millennium denying that that is the case.

It is important to pay particular attention to the case pleaded by Mr Rogers, for it was that case that Millennium and Mr Fenech answered, and not the sometimes more general assertions made in Mr Rogers submissions.

Provisions concerning Fair Treatment

The Fair Treatment provisions of the General Conditions of Employment — Staff relevantly provide as follows:

1. Discuss the problem with their immediate Supervisor.

40 Exhibit A4.

41 Amended Statement of Claim, para.5.

42 Exhibit A2, cl.11.0 (“Fair Treatment Provision”).

43 Exhibit A4. Although the Fair Treatment provisions of the General Conditions of Employment — Staff refer to the Millennium Inorganic Chemicals “Fair Treatment Procedure” as outlining the process to be followed should such problems arise, it is common ground that the Fair Treatment Policy (Exhibit A4) is now the applicable document.
If an employee feels it is inappropriate to discuss the problem with the immediate supervisor, the matter may be referred directly to the next level supervisor or to a member of the Human Resources Department.

2. If the matter is still unresolved after the initial discussion, employees have the opportunity to forward details in writing to the next line of authority and to make subsequent referrals to higher levels if necessary.

3. If this process does not resolve the matter, employees may put the matter to the Director — Manufacturing Asia/Pacific or Human Resources manager for a final decision. Normally the first three steps are completed in 10 weeks or as otherwise agreed.

4. Where the procedure does not resolve the question dispute, either the Company or the employee has the right to refer the question or dispute to arbitration by an Arbitrator. The Arbitrator will be an appointed Justice of the Peace as mutually agreed between the Company and employee. Where the parties fail to reach agreement, the arbitrator may be an Alternative Disputes Registered Organisation or applicable Industrial Relations Commission.

These provisions which entail a “commitment” to fair treatment of Mr Rogers, rather than his “being entitled” (as for example in the case of annual leave, long service leave and gazetted public holidays), are indicative of the fair treatment provisions being neither contractual in nature, nor being intended to be enforceable provisions of an AWA. The fair treatment provisions can in the Court’s view be fairly described as a non-promissory commitment, a view reinforced when juxtaposed against the language of entitlement used in the Fair Treatment Provision and the Fair Treatment Policy. The Court takes the same view with respect to Millennium’s Code of Business Conduct, which, although not pleaded, was referred to in submissions by Mr Rogers.

In the circumstances there is no express term of the AWA as to fair treatment which could have been breached by Millennium, and that part of Mr Rogers’ claim which alleges contravention of the AWA by reason of a breach of fair treatment provisions must fail, and will be dismissed.

Alleged Breach of alleged Implied Term of Mutual Trust and Confidence

Mr Rogers alleges that it is an implied term of his contract of employment that Millennium would not without reasonable cause conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between Mr Rogers and Millennium, this being the Implied Term of Mutual Trust and Confidence. Millennium says that there are no grounds on which the Implied Term of Mutual Trust and Confidence should be implied into Mr Rogers’ contract of employment, alternatively, if grounds are found to exist, that there is no Implied Term of Mutual Trust and Confidence in Mr Rogers’ contract of employment as alleged. Further, Millennium says that if there is an Implied Term of Mutual Trust and Confidence as alleged it does not extend to

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44 The General Conditions of Employment — Staff cl.6.0 and 7.0 are headed “LEAVE ENTITLEMENTS”. Employees are said to be entitled to various types of leave including annual leave for non-shift and shift employees (sub-cl.6.1), long service leave (sub-cl.6.3) and overseas employees local statutory public holidays (cl.7.0), and differing leave “entitlements” (pro-rated) are prescribed for part-time employees (cl.6.0).

45 Nikolich Appeal at [305] per Jessup J.

46 Nikolich Appeal at [39]-[42] per Black CJ (with whom Marshall J agreed at [162]).

47 Nikolich Appeal at [305] and [311] per Jessup J.

48 Exhibit A 6.
termination of employment. Finally, Millennium says that if there is an Implied Term of Mutual Trust and Confidence as alleged, the Implied Term of Mutual Trust and Confidence was not breached by Millennium.

**Existence of alleged Implied Term of Mutual Trust and Confidence**

It is first necessary to determine whether the alleged Implied Term of Mutual Trust and Confidence is one implied in law into contracts of employment under Australian law. It is first necessary to examine some of the English cases before examining some of the Australian cases.

**English cases**

Argument about whether an Implied Term as to Mutual Trust and Confidence exists in contracts of employment is a relatively recent development in the legal history of employment contracts. Arguably, that history can be traced through a series of English cases from the late 1970’s to the eventual approbation of a duty to be implied into a contract of employment in English common law by the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)*.

The origins of the alleged duty probably lie in the general duty of cooperation between contracting parties. In England it has been said to represent a continuation of a development throughout the twentieth century of imposing greater duties on employers.

Similarly in *Johnson v Unisys Ltd* Lord Hoffmann referred to the transformation of the contract of employment so as to recognise the social reality that employment is "one of the most important things in … life. It gives not only a livelihood but an occupation, and identity and a sense of self-esteem."

In *Woods v WM Car Services (Peterborough) Ltd* it was noted that:

> In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee…

This reasoning was upheld by the Court of Appeal in *Woods* Appeal, and was subsequently followed in many English cases.

In *Malik* the House of Lords formally recognised the existence of a duty of mutual trust and confidence. The background is as follows. Provisional liquidators were appointed to the Bank of Credit and Commerce International SA. The provisional liquidators summarily dismissed Mahmud and Malik.

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51 *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 335 per Lord Slynn.

52 [2001] 2 WLR 1076 at 1091 per Lord Hoffman (*Johnson*).

53 Woods at 670 per Wilkinson-Browne VC, citing *Courtaulds*.

did so on the basis of redundancy. Mahmud had been with the Bank for 16 years, and was a Branch Manager. Malik had been with the Bank for 12 years and was Head of Deposits Accounts at one of the Bank’s branches. The UK Companies Court made a winding up order in respect of the Bank and appointed liquidators on 14 January 1992. On 30 March 1992 the liquidators called for submission of proof of debt forms. Mahmud and Malik submitted proof of debt forms, including a claim for damages for pecuniary loss allegedly caused by the Bank’s breach of an implied contractual obligation of Mutual Trust and Confidence. The claim was founded on an assertion that the Bank had been operated in a corrupt and dishonest manner, and that, despite the personal innocence of the employees, they had subsequently been unable to obtain employment in the financial services industry. The liquidators rejected the claims for loss. They did so on the basis that a former employee is not legally entitled to claim damages for loss of reputation caused by a breach of contract by the employer.\(^\text{55}\)

Malik and Mahmud appealed to the UK Companies Court. The issue before that Court was whether the evidence disclosed a sustainable claim for damages. Malik and Mahmud alleged that a term was to be implied into their contracts of employment that:

The employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.\(^\text{56}\)

The claim was based on an assumed set of facts, and it was on this set of assumed facts that the decision at first instance before the UK Companies Court, on appeal in the UK Court of Appeal, and then on final appeal to the House of Lords was made. The statement of assumed facts read as follows:

The facts and matters upon which the applicants rely are as follows:

(a) the applicants were employees of the Bank;
(b) the Bank operated in a corrupt and/or dishonest manner;
(c) the applicants were innocent of any involvement in the Bank’s corruption and/or dishonesty;
(d) following the collapse of the Bank, its corruption and/or dishonesty has become widely known;
(e) in consequence, the applicants are now at a handicap on the labour market because they are stigmatised by reason of their previous employment by the Bank;
(f) the applicants have suffered a loss in consequence of (e) above.\(^\text{57}\)

Malik and Mahmud failed before the UK Companies Court because it was found that a term could not be implied because it was not part of an employment contract to prepare an employee for service with future employers.\(^\text{58}\) Before the UK Court of Appeal the employees also failed, but for different reasons. The UK Court of Appeal accepted (as did the House of Lords) that there was an arguable case that there had been a breach of the Implied Duty

\(^{55}\) The above background is taken from the judgment in Malik at 33 per Lord Nicholls and 42-43 per Lord Steyn.

\(^{56}\) Malik at 34 per Lord Nicholls and 43 per Lord Steyn.

\(^{57}\) Malik at 43 per Lord Steyn.

\(^{58}\) Malik at 44 per Lord Steyn.
of Mutual Trust and Confidence (which before the UK Court of Appeal and the House of Lords the liquidator agreed was an implied term of a contract of employment). 59

The claim failed in the UK Court of Appeal because the damages sought were characterised as damages to the employees’ previously existing reputations, and it was found that damages were not legally recoverable because they were compensation for damage to reputation alone. 60

The employees succeeded before the House of Lords. The duty was recognised as imposing an obligation that an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, 61 or that the conduct must impinge on the relationship so that when examined objectively, the conduct is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in the employer. 62

The duty, insofar as it is an Implied Term of Mutual Trust and Confidence in the contract of employment is a term implied by law, which operates as a default rule, in the absence of any exclusion or modification by the parties. 63 Thus, it can be excluded by express terms in the contract of employment. 64

The availability of the remedy of damages for financial loss suffered will apply to premature termination losses and continuing financial losses. Premature termination losses include salary, allowances and other benefits - for example, superannuation rights, commission and motor vehicle allowances - under the contract of employment. 65 Continuing financial losses are those that arise from the prejudicial effect on future employment. In Malik, it was held that this prejudicial effect was reasonably foreseeable as a result of the breach of the duty of mutual trust and confidence. Put differently, the duty is not to improve an employee’s prospects, but it is the employer’s duty not to positively harm the employee’s future prospects. 66

In Malik the damages were held to be available to the employees for loss of reputation which resulted in their inability to obtain employment. This was based on a breach of the contract separate from and independent of the termination of the contract of employment. 67 It is this separate and independent breach of the contract of employment which allowed for the recovery of damages in Malik, and which enabled the House of Lords to distinguish the circumstances from those in Addis v Gramophone Co Ltd 68 where it was held that no damages were to be awarded for the manner of the wrongful dismissal in that case. The damages in Malik were awarded for breach of contract and not

59 Malik at 34 per Lord Nicholls and 44 per Lord Steyn.
60 Malik at 44-45 per Lord Steyn.
61 Malik at 45 per Lord Steyn.
62 Malik at 35 per Lord Nicholls.
63 Malik at 45 per Lord Steyn.
64 Malik at 44 per Lord Steyn; Johnson at 1084 per Lord Steyn.
65 Malik at 36 per Lord Nicholls.
66 Malik at 37-38 per Lord Nicholls.
67 Malik at 40-41 per Lord Nicholls; 52 per Lord Steyn.
for the manner of the breach. Therefore, if wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation. If, however, the damage flows from breach of another implied term of the contract, the rule in Addis can be avoided. Therefore, damages may be payable for the manner and circumstances of the dismissal, as measured by standards of conduct identified in the duty of mutual trust and confidence. The scope of the duty, and its potential breach, is circumscribed by a number of factors. These include:

a) there must be no reasonable and proper cause for the employer’s conduct; and
b) that conduct must be calculated to destroy or seriously damage the relationship of Trust and Confidence, or be likely to do so insofar as the employee is reasonably entitled to have trust and confidence in the employer.

Thus damages may be difficult to recover. It was pointed out in Malik, for example, that loss of reputation is inherently difficult to prove.

The question subsequently arose as to whether there is a further limitation in circumstances where statutory provisions concerning termination might exclude any common law right with respect to the implication of a term in a contract of employment based on a duty to act reasonably, fairly or in good faith (which are elements of the Duty of Mutual Trust and Confidence). To imply a term incorporating the duty in respect of the manner of dismissal where there is a legislative prescription concerning that dismissal would result in two competing systems: one at common law, one under the statute. Rights and remedies would overlap. The House of Lords held that it is inappropriate to import an implied term to regulate the manner of dismissal in the face of a statutory regime with respect to dismissal.

Australian cases

Can an Implied Term of Mutual Trust and Confidence be implied generally into employment contracts in Australia?

The High Court has spoken of the:

necessary confidence between employer and employee and more recently has said that:

The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust.

In Burazin v Blacktown City Guardian the Full Court of the Industrial Relations Court agreed that there was ample English authority for the Implied Term of Mutual Trust and Confidence, but noted that at that time there was no English authority supporting the view that damages were available for breach of

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69 Malik at 38 per Lord Nicholls; Johnson at 1098 per Lord Millett.
70 Malik at 39 per Lord Nicholls; Johnson at 1089 per Lord Steyn and 1093 per Lord Hoffman (Lord Steyn was in dissent as to the ultimate result, but not on this issue).
71 Malik at 53 per Lord Steyn.
72 Johnson at 1078 per Lord Nicholls and 1102 per Lord Millett.
73 Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66 at 81 per Dixon and McTiernan JJ.
74 Concut Pty Ltd v Worrell (2000) 75 ALJR 312; 103 IR 160 at [51] per Kirby J.
75 Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 144 (Burazin).
the Implied Term of Mutual Trust and Confidence. Ultimately the Full Court of the Industrial Relations Court left the question open as to whether there was an Implied Term of Mutual Trust and Confidence in Australian law, but also said that it “would be a significant step” for that court “to refuse to follow” the judgments of the English Court of Appeal in Bliss and Malik CA.

In Perkins v Grace Worldwide the Full Court of the Industrial Relations Court, in dealing with the principles related to impracticability of reinstatement, said:

Trust and confidence is a necessary ingredient in any employment relationship. That is why the law imports into employment contracts an implied promise by the employer not to damage or destroy the relationship of trust and confidence between the parties, without reasonable cause: see Burazin …. The implication is not confined to employers, it extends to employees: see for example Blyth Chemicals … at 81-82 and North v Television Corporation Ltd (1976) 11 ALR 599 at 609. So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration …, provided that such loss of trust and confidence is soundly and rationally based.

In Easling v Mahoney Insurance Brokers Olsson J (although in the minority) expressed the following without dissent from the other members of the Full Court (Doyle CJ and Bleby J):

The authorities establish the concept that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

In Thomson v Orica Australia Pty Ltd the existence of the Implied Term of Mutual Trust and Confidence was accepted by the Federal Court. Allsop J said that:

… if one is to approach the matter in straightforward contractual terms there is ample authority for the implication of a term in a contract of employment that the employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee: ….

In Thomson the Federal Court went on to find that there had been a serious breach of the Implied Term of Mutual Trust and Confidence because an employer had seriously breached the terms of the employer’s family Leave Policy, a policy which reflected important matters in the employment relationship regulated by State legislation.

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76 Burazin at 151 per Wilcox, von Doussa and Marshall JJ. This was at time prior to the House of Lords judgment in Malik, but after the judgment of the UK Court of Appeal in Malik v Bank of Credit & Commerce International SA [1995] IRLR 375 (Malik CA).
77 Burazin at 154 per Wilcox, von Doussa and Marshall JJ. The question was left open because the claim was able to be determined on the statutory claim made by Mrs Burazin.
79 Perkins at 191 per Wilcox CJ, Marshall and North JJ.
80 Easling v Mahoney Insurance Brokers (2001) 78 SASR 489 (Easling).
81 Easling at [99] per Olsson J.
83 Thomson at [141] per Allsop J.
84 Thomson at [144]-[148] per Allsop J.
Russell v Trustees of Roman Catholic Church for Archdiocese of Sydney\textsuperscript{85} involved the Director of Music at St Mary’s Cathedral in Sydney, who had been dismissed following accusations of inappropriate conduct toward two boy choristers by a sacristan who was boarding at the Director’s house. In an action for wrongful dismissal and breach of two implied terms — good faith and trust and confidence — it was alleged that the inquiry and process for arriving at a conclusion were flawed and in breach of the implied duties. The inquiry had involved a two stage process: fact finding followed by a separate decision based on the facts as found. The New South Wales Supreme Court reviewed much of the Australian case law set out above,\textsuperscript{86} and also examined the conceptual underpinnings of the alleged implied duties,\textsuperscript{87} before determining that the implied duties (and particularly for present purposes, the Implied Term of Mutual Trust and Confidence) arose under Australian law.\textsuperscript{88}

In Russell it was accepted that the Implied Term of Mutual Trust and Confidence did not apply to or affect the right to terminate the contract of employment.\textsuperscript{89} However, the authors of a leading Australian employment law text suggest that Russell “appear[s] to draw a line between the actual dismissal and the events that preceded the dismissal such as investigative processes and inquiries.”\textsuperscript{90} In this Court’s view it is not appearance but actuality, for the New South Wales Supreme Court went on to consider the employer’s investigative and decision making processes, and found that:

a) the use of a two step process was not a breach of any implied duty;\textsuperscript{91}

b) the employer had reasonable cause to act as it did having regard to the findings of fact and its duties to children under its care, even if the findings of fact were wrong;\textsuperscript{92}

c) there was a breach of an implied duty (it is not said whether it was the implied duty of good faith or the Implied Term of Mutual Trust and Confidence) by reason of a failure to interview a critical witness in person rather than over the phone.\textsuperscript{93}

In short, Russell applied the Implied Term of Mutual Trust and Confidence to events up to the time of the decision to terminate, but not to events beyond the time at which that decision was made.

Russell was appealed to the New South Wales Court of Appeal.\textsuperscript{94} Giles JA dismissed the appeal assuming, but seemingly not finally deciding, that there was an Implied Term of Mutual Trust and Confidence.\textsuperscript{95} Campbell JA also dismissed the appeal, observing that:

\textsuperscript{85} Russell v Trustees of Roman Catholic Church for Archdiocese of Sydney (2007) 69 NSWLR 198; 167 IR 121 (Russell).

\textsuperscript{86} Russell at [121]-[122] and [129]-[133] per Rothman J.

\textsuperscript{87} Russell at [123]-[128] and [129]-[133] per Rothman J.

\textsuperscript{88} Russell at [134] per Rothman J.

\textsuperscript{89} Russell at [138] and [141] per Rothman J.

\textsuperscript{90} Macken’s Law of Employment, p.184.

\textsuperscript{91} Russell at [156] per Rothman J.

\textsuperscript{92} Russell at [161] per Rothman J.

\textsuperscript{93} Russell at [164] per Rothman J.

\textsuperscript{94} Russell v Trustees of the Roman Catholic Church for Archdiocese of Sydney (2008) 176 IR 82 (Russell Appeal).

\textsuperscript{95} Russell Appeal at [1] per Giles JA.
a) some Australian cases have determined that an employer owes a duty of
good faith to employees, and

b) he was content to decide the present case assuming, without deciding,
that the employer owed the implied contractual obligations of the type
alleged by the employee, Mr Russell. 96

The principal judgment was delivered by Basten JA. Basten JA noted that in
Russell there were said to be two implied terms (good faith and the Implied
Term of Mutual Trust and Confidence), but said that “it is probably sufficient to
identify them as a single obligation” 97 citing the opinion of Lord Nicholls of
Birkenhead that:

The trust and confidence implied term means, in short, that an employer must treat
his employees fairly. 98

Basten JA also said that the scope and extent of any implied duties were
uncertain because:

… an employer may act with reasonable and proper cause to pursue its own
interests, whether or not they are adverse to those of the employee, and may
terminate the employment at any time without cause on giving notice, … 99

and that in Australia the implied duties had:

enjoyed more limited recognition than in the UK and have usually been called in
aid to identify the kind of conduct of an employer sufficient to constitute
“constructive dismissal”, which the employee can treat as a repudiation of the
contract of employment. 100

Basten JA held that the manner and form of the employer’s inquiry were
matters of judgment for the employer, and that that included whether or not a
key witness ought to have been interviewed by telephone, or in person, finding
that it was difficult to understand how a telephone interview of a key witness
could constitute serious damage to mutual trust and confidence, 101 and further
said:

That more could, and even should, have been done falls short of demonstrating
any want of good faith, or conduct destructive of mutual confidence, in a context
where the employer was obliged to carry out an investigation with a view to
terminating employment if a sufficient factual basis were established. This was not
a case of constructive dismissal based on destructive behaviour of the employer,
but of actual dismissal based upon the adverse findings in Mr Cooke’s report. No
breach of any implied term of good faith dealings with an employee was
established. 102

Since the judgment in Russell there have been other judgments of the New

96 Russell Appeal at [73] per Campbell JA.
97 Russell Appeal at [32] per Basten JA.
99 Russell Appeal at [32] per Basten JA.
100 Russell Appeal at [32] per Basten JA.
101 Russell Appeal at [37] per Basten JA.
102 Russell Appeal at [37] per Basten JA.
South Wales and South Australian Supreme Courts in which they have accepted that the Implied Term of Mutual Trust and Confidence is part of Australian law.\textsuperscript{103}

\textit{Conclusion — An Implied Term of Mutual Trust and Confidence in Australian law?}

Having regard to the fact that the existence of the Implied Term of Mutual Trust and Confidence has been recognised, not only in the most senior court of the United Kingdom, but also by Australian superior courts including the former Full Court of the Industrial Relations Court, the Federal Court, and various State Supreme Courts and by at least one member of the New South Wales Court of Appeal (with the other two members assuming its existence), this Court considers that it must recognise the Implied Term of Mutual Trust and Confidence is part of Australian law in relation to contracts of employment and should be implied into contracts of employment, unless expressly excluded by the parties.

The Implied Term of Mutual Trust and Confidence applies to events leading up to the decision to terminate employment, but not the decision to terminate itself, or its implementation.

\textit{The alleged breach by Millennium of the Implied Term as to Mutual Trust and Confidence}

Each of the four bases on which it is alleged by Mr Rogers that there was a breach of the Implied Term of Mutual Trust and Confidence are dealt with below.

Para. 37(a) of Amended Statement of Claim

Mr Rogers alleges a breach of the Implied Term of Mutual Trust and Confidence by reason of Millennium giving consideration to terminating his employment before conducting any investigation of his account of the events on the night of 12 February 2007 when it is alleged by Millennium that Mr Rogers has walked away from the packing heads causing a shut down. However, it is clear that at the meeting on 15 February 2007 more than just the incident of 12 February 2007 was discussed. The notification of absence of sick leave issue was also discussed, and the Court finds that it was in the context of both issues, plus an expressed lack of supervisory confidence in Mr Rogers, that he was advised that consideration was being given to his termination. Put in context by this time there had been:

a) the meeting of 5 February 2007 about the sick leave claim;

b) inquiries concerning what Mr Rogers had been told by the medical specialist’s secretary;

c) a preliminary view formed by Mr Fenech (whether rightly or wrongly is immaterial) that there was a basis for concluding that Mr Rogers had been dishonest in relation to the events concerning his absence and had claimed sick leave to which he was not entitled; and

d) a serious allegation raised about his performance in relation to the packing heads incident.

\textsuperscript{103} Morton v Transport Appeal Board (No 1) (2007) 168 IR 403 at [154]-[155] per Berman AJ (expressly following Russell); McDonald v South Australia (2008) 172 IR 256 at [373]-[390] per Anderson J; Downe v Sydney West Area Health Service (No 2) (2008) 174 IR 385 at [326]-[328] and [411] per Rothman J.
Further, at the meeting on 15 February 2007 Millennium had obtained Mr Rogers version of events (which by inference must have been doubted) before indicating to him, in the context of all the matters referred to above, that termination of employment was being considered.

In the overall context set out above the Court considers that Millennium had reasonable and proper cause to indicate to Mr Rogers that termination of employment was being considered. Moreover, given that that was the case it is in the Court’s view arguable that it might have been a breach of the Implied Term of Mutual Trust and Confidence for it not to have done so.

In any event the allegation of breach cannot succeed because Mr Rogers was told there would be a further investigation of the packing heads incident upon which he would be given the opportunity to comment. It was clear therefore that even though consideration was being given to termination, that at least in respect of the packing heads incident there was to be further investigation and an opportunity to comment before any decision was made concerning that incident and its effect in relation to Mr Rogers’ ongoing employment. There was, almost immediately, a further investigation of the packing heads incident. That investigation concluded that Mr Rogers had walked away from the packing heads whilst he was on duty causing problems with ongoing production on the lines. The Court is satisfied that allegation was put to him in a meeting on 16 February 2007, and that Mr Rogers refused to answer it directly, but rather insisted that he be told the identity of the persons making the allegations against him. Thus, the Court does not consider that when the events of 12, 15 and 16 February 2007 in relation to the packing heads incident are examined in their complete and proper context, that there was any breach of the Implied Term of Mutual Trust and Confidence. Even if, contrary to the above findings, there was a breach of the Implied Term of Mutual Trust and Confidence at the meeting on 15 February 2007, the effect of that breach extended no further than the next day, when it was cured by the opportunity to comment on the subsequent investigation, and in those circumstances it is difficult to see what, if any, damage might have been suffered.

There was in the Court’s view no breach as alleged in para.37(a) of the Amended Statement of Claim.

Para. 37(b) of Amended Statement of Claim

Mr Rogers alleges a breach of the Implied Term of Mutual Trust and Confidence by reason of Millennium refusing to tell Mr Rogers the identity of the persons who had provided the account of the events of 12 February 2007 or in what way the account of events differed from his account.

Mr Rogers denied leaving the packing heads at the 15 February 2007 meeting. At the 16 February 2007 meeting Millennium again put it to Mr Rogers that he had done so. He again denied that he had done so. That denial is a complete answer to the allegation made. It is then immaterial who provided the account relied upon by Millennium. The manner in which the accounts of events might differ is also immaterial because the fundamental allegation is denied by Mr Rogers. There is no obligation upon an employer in
an investigation of this kind to conduct a perfect investigation or an investigation the equivalent of a police investigation or to disclose the names of persons who might have witnessed relevant events.\textsuperscript{104}

This allegation as pleaded in para.37(b) of the Amended Statement of Claim does not constitute a breach of the Implied Term of Mutual Trust and Confidence.

Para. 37(c) of Amended Statement of Claim

Mr Rogers alleges a breach of the Implied Term of Mutual Trust and Confidence by reason of Millennium unlawfully deducting from his salary and allowances his alleged sick leave entitlement for 22 January 2007.

The entitlement to sick leave is prescribed by the terms of the Sick Leave policy, which it is common ground form part of the AWA and the contract of employment. Thus, it seems that whether or not there is an entitlement is subject to the express terms of the Sick Leave Policy, and there is no room for the operation of the Implied Term of Mutual Trust and Confidence.\textsuperscript{105}

In any event, Millennium has under the policy a discretion to review each application for sick leave. It exercised that right in this case. Access to sick leave is for cases of “genuine illness or injury”. In this case there was a pre-existing injury. It does not seem to be in dispute that that pre-existing injury did not render Mr Rogers incapable of working. Again there is no dispute that on this occasion Mr Rogers chose to take a medical specialist’s appointment at a time which suited Mr Rogers’ personal convenience, and as a consequence of which he was unable to return to work in time for his rostered night shift on 22 January 2007. It was open for Millennium on review to conclude that this was not a case of genuine injury giving rise to a sick leave absence, but rather an absence caused by Mr Rogers choosing to take a medical appointment at a time that suited him, and which if it had not been taken, would have meant that he was able to travel back to Bunbury and work as normal, the knee injury not precluding him from doing so. That it was not the injury itself that was the reason for the absence is confirmed by the Application for Sick Leave on which Mr Rogers has written “DOCTORS” as the reason for absence, not “knee injury”.

There was an after the event attempt to justify the absence as genuine sick leave on the basis of fatigue. Given the personal choice made by Mr Rogers as to the timing of the medical specialist’s appointment, and the reason given (the next day) on the Application for Sick Leave, Millennium in exercising its discretion on a review of the application would have been entitled to reject such a justification.

In the above circumstances it was open to Millennium to decide, and they had reasonable and proper cause to conclude, that this was not a case of genuine sick leave, and therefore there was in the Court’s view no breach as alleged in para.37(c) of the Amended Statement of Claim.

Para. 37(d) of Amended Statement of Claim

Mr Rogers alleges a breach of the Implied Term of Mutual Trust and Confidence by reason of Millennium failing to pay Mr Rogers all his entitlements on termination of employment. This is a matter after the decision to

\textsuperscript{104} Morton at [161]-[164] per Berman AJ; Russell Appeal at [37] per Basten JA.

\textsuperscript{105} Malik at 44 per Lord Steyn; Johnson at 1084 per Lord Steyn.
terminate and related to the termination itself. As such it is not part of the Implied Term of Mutual Trust and Confidence. Thus, the allegation of breach pleaded in para.37(d) of the Amended Statement of Claim cannot succeed.

Mr Fenech’s involvement in Millennium’s contraventions

Mr Rogers alleges that Mr Fenech was involved in Millennium’s alleged contraventions of the WR Act and Mr Rogers’ AWA in that he aided, abetted, counselled or procured the contraventions or was knowingly concerned in or a party to the contraventions. As the Court has found that the alleged contraventions have not been proven, the application against Mr Fenech must also fail, and must be dismissed.

Application in a Case

The application in a case filed 6 March 2008 must also be dismissed as it deals with matters related to damages, which, in the circumstances, do not arise.

Conclusions and Orders

None of the pleaded grounds of the application have been made out by Mr Rogers. The application must be dismissed. It follows that the applicant’s application in the case must also be dismissed. There will be orders accordingly.

The Court will hear the parties as to costs, if any.

Application dismissed

Solicitor for the applicant: Megan in de Braekt.

Solicitors for the first and second respondents: Freehills.

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106 Johnson at 1078 per Lord Nicholls and 1102 per Lord Millett; Russell at [138] and [141] per Rothman J.